UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 2, 1997

RICHARD AGUILAR,	)	
Complainant,	)	8 U.S.C. § 1324b
	)	
v.	)	OCAHO Case No. 97B00079
	)	
UNITED PARCEL SERVICE,	)	
Respondent.	)	

FINAL DECISION AND ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act, 8 U.S.C. § 1324b (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA) and by the Immigration Act of 1990 (IMMACT),[1] in which Richard Aguilar is the complainant and United Parcel Service (UPS), Anaheim, California, is the respondent. A letter dated December 9, 1996, to the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) from John B. Kotmair, Jr. (Kotmair), Director of the National Worker's Rights Committee, accompanies the complaint.

Also accompanying the complaint is a letter dated January 30, 1997 from OSC to Kotmair informing him that with respect to charges filed by him on behalf of eleven different individuals, including Aguilar:

> Based on this Office's investigation, the Special Counsel has determined that there is insufficient evidence of reasonable cause to believe that any of these charges state a cause of action under 8 U.S.C. § 1324b. See Tossaint (sic) v. Tekwood Associates, Inc., ___ OCAHO ___ (1996).

The letter authorizes the filing of a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of receipt.

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (IIRIRA), amended § 1324b(a)(6) as it applies to practices after a date to be set within one year subsequent to September 30, 1996. The amendments have no application to this case.

The complaint was filed with OCAHO on March 31, 1997, with various attachments. Kotmair's Notice of Appearance was subsequently filed on April 11, 1997. [2] Although Aguilar was employed by UPS from 1975 or 1976 until his termination on February 12, 1997, he seeks back pay from May 1996. The significance of that date is unexplained.

On his complaint form, Aguilar checked the box stating "yes" to the following statement:

> The Business/Employer refused to accept the documents that I presented to show I can work in the United States.

However, he crossed out the phrase, "to show I can work in the United States."

Specifically, the complaint alleges that UPS engaged in conduct prohibited by the INA when it refused to accept Aguilar's "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status,"[3] as well as his "Affidavit of Constructive Notice asserting my rights as a Citizen of the U.S. as seen by the U.S. Supreme Court, and there by [sic] revealing that I am not to be treated as an alien." According to Kotmair's letter to OSC, the documents were submitted to UPS on June 24, 1996.

Aguilar also checked the box on the complaint form stating "yes" in response to the following statement:

> I was intimidated, threatened, coerced or retaliated against because I filed or planned to file a complaint, or to keep me from assisting someone else to file a complaint.

Aguilar was terminated on February 12, 1997. Attached to the complaint is an explanation of the alleged acts of retaliation which describes the events leading to his termination

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[2] Kotmair's Notice of Appearance references an "enclosed Power of Attorney of the complainant," although no such document appears to have been submitted with that Notice. A power of attorney document is attached to the original complaint, apparently appended to a charge filed against UPS by Aguilar with the Equal Employment Opportunity Commission (EEOC). That power of attorney grants Kotmair "permission" to represent Aguilar "before ... OCAHO" and "before an Administrative Law Judge in OCAHO."

[3] Aguilar's "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" is not part of the record, and there is no assertion that it is related in any way to INS forms N-560 or N-561 Certificate of United States Citizenship. These forms, issued by the INS, do not purport to address issues of federal taxation.

as a driver for UPS. It states that on December 18, 1996, he was arrested and charged with "DWI" [Driving While Intoxicated]. Upon his release, he notified his manager. On February 6, 1997, he was found guilty and sentenced. He did not learn until some time after February 6, 1997 that his driver's license had been suspended since December 28, 1996. Aguilar had shown his license to his UPS supervisor after his arrest when he did not know that it had been suspended. The reason proffered by UPS for his dismissal, according to Aguilar, was "dishonesty about my license." Aguilar claims that at no time had he been dishonest or failed to inform his UPS supervisor of "all that I was aware of or that had happened." Aguilar does not allege any causal connection between the submission of his documents and his termination as a driver. Neither does he allege that his termination was related to his citizenship or national origin.

On May 13, 1997, UPS filed an answer denying the material allegations of the complaint together with a motion to dismiss the complaint for failure to state a claim. Respondent admits that Aguilar worked for UPS since 1975 or 1976 and that he was fired from his job as a driver on February 12, 1997. Three grounds are asserted for its motion to dismiss: first, that complainant does not allege that his termination was on the basis of citizenship status or national origin; second, that complainant alleges no improper conduct with regard to verification of any work authorization document; and third, that complainant is apparently confusing a New Mexico Department of Motor Vehicles work permit driver's license with an INS work permit authorization.

On June 6, 1997, complainant filed his reply to respondent's answer and motion to dismiss. That reply addresses only UPS's refusal to honor Aguilar's Statement of Citizenship and Affidavit of Constructive Notice. It does not discuss Aguilar's discharge or any alleged acts of retaliation. Instead, it states that "Respondent is correct in its assertion that 'The Complaint Does not Allege Termination on the Basis of Citizenship or National Origin." Rather, "[t]he substance of the complainant's charge relates solely to the respondent's refusal to recognize and honor the documents."

The response acknowledges that Aguilar's documents were submitted for the purpose of avoiding his federal income tax obligations, not for the purpose of verifying his employment eligibility. Aguilar sets forth at length the theory that only nonresident aliens, and not United States citizens, are required to participate in the social security system or to be subject to withholding for income taxes.

III. STANDARDS FOR RULING ON A MOTION TO DISMISS

A motion to dismiss should be granted only in the very limited circumstances where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). Although I must liberally construe the allegations in the complaint in the light most favorable to complainant, I am not required to assume that Aguilar can prove facts which have not been alleged, see Associated Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S.

519, 526 (1983), to consider facts which would be inadmissible at a hearing, or to make unwarranted inferences. Neither am I required to accept as true any conclusions regarding the legal effects which flow from the events Aguilar sets out.

Even liberal pleading standards have their limits and complainant must allege more than unsupported conclusions of law to defeat an otherwise meritorious motion to dismiss. See, Pulda v. General Dynamics Corp., 47 F.3d 872, 878 (7th Cir. 1995). If there is no reasonable prospect that a valid claim can be made out based on the facts alleged, the motion to dismiss should be granted. A complaint which does not set forth either direct or inferential allegations respecting all of the material elements necessary to sustain a recovery under some viable legal theory is subject to dismissal. LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1103 (6th Cir. 1995).

DISCUSSION

IRCA established a comprehensive system of employment eligibility verification, 8 U.S.C. § 1324a, as well as prohibitions against certain unfair immigration-related employment practices, 8 U.S.C. § 1324b. Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer is obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a worker's identity and employment eligibility under § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v)(1996), and to complete a Form I-9 for each new employee.

The specific provision at issue in this proceeding, 8 U.S.C. § 1324b(a)(6) was added by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents. It provides that certain documentary practices may be treated as discriminatory hiring practices.

> For purposes of paragraph (1),[4] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[5] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals. (emphasis added).

Regulations identifying the specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§ 1324a(b)(1)(B), (C), and (D), 8 C.F.R.

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[4] Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[5] Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

§§ 274a.2(b)(1)(v)(A), (B), and (C). When a document from those lists is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document if it appears on its face to be genuine. The documents Aguilar submitted are not among the listed documents acceptable to show identity or work eligibility pursuant to these regulations.

As is by now well established in OCAHO jurisprudence, the activities prohibited by 8 U.S.C. § 1324b include discrimination in hiring, firing, recruitment, referral for a fee, retaliation for engaging in protected activity, and document abuse. 8 U.S.C. §§ 1324b(a)(1), (a)(5), and (a)(6). Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 9 (1997) (citing Smiley v. City of Philadelphia, 7 OCAHO 925, at 18 (1997)); Tal v. M.L. Energia, Inc., 4 OCAHO 705, at 14 (1994). Other terms and conditions of employment such as wages, promotions, employee benefits, and the like are beyond the reach of the INA. See, Lareau v. USAir, Inc., 7 OCAHO 932, at 11 (1997) (citing cases). Thus, a long-term incumbent employee's complaints about the terms and conditions of his employment fail to state a claim under § 1324b. Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 3-4, 9 (1997); Horne v. Hampstead, 6 OCAHO 906, at 5-6 (1997).

Regulations implementing the employment eligibility verification system make clear that the statute was to have prospective application only. Employers are required to examine documents and to complete a Form I-9 only for individuals hired after November 6, 1986 who continued to be employed after May 31, 1987. 8 C.F.R. § 274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. § 274a.7. Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair hiring practice if, and only if, (1) the employee was recruited, hired, or referred for a fee after November 6, 1986; (2) the documents were presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral; (3) the documents on their face appear to be genuine; and (4) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system. The facts of this case as alleged in the complaint fail to satisfy any of these elements.

First, because Aguilar was steadily employed by respondent from 1975-1976 until February 1997, he was not an employee hired subsequent to the enactment of IRCA in 1986. UPS never had any obligation to make an inquiry as to his employment eligibility, to review any documents establishing his employment eligibility, or to complete a Form I-9 for him. Indeed, the complaint does not allege that UPS ever requested any documents whatsoever for the purposes of establishing Aguilar's eligibility to work in the United States. The employment eligibility verification process never comes into the picture at all for an individual who remained continually employed by the same employer from 1975-76 to 1997.

Second, both the original complaint form and complainant's reply to respondent's motion to dismiss acknowledge that Aguilar's "Statement of Citizenship" and "Affidavit of Constructive Notice" were not tendered to show his eligibility for hire in the United States. It is not alleged

that UPS requested any documents, or that document submission was required to verify employment eligibility or comply with federal law. Rather, Aguilar's documents were submitted for the purpose of avoiding his federal income tax obligations.

Third, neither the INS nor the Social Security Administration has exempted Aguilar from withholding for taxes and no other entity, including the National Worker's Rights Committee, has any statutory authority to do so and it is accordingly unclear how the documents could appear to be "genuine."

Fourth, the documents tendered were not in any event documents acceptable to show identity and/or employment authorization for purposes of satisfying the requirements of the employment verification system set out at § 1324a(b). Neither document appears on List A, B or C. Because Aguilar's documents are not documents acceptable to show he can work in the United States, the refusal of his employer to accept them, even had they been presented for that purpose, would not violate the INA.

Jurisdiction of administrative law judges over allegations of document abuse is limited by the terms of the governing statute. The employment verification system is set out in 8 U.S.C. § 1324a(b) which identifies the specific documents approved for the purpose of establishing identity and employment eligibility. Nothing in the statutory scheme permits much less requires an employer to accept documents other than the ones specifically approved to show eligibility to work in the United States. Nothing in the employment eligibility verification process touches on an employee's federal income tax withholding obligations. Rejection of an employee's unilateral claim of tax exemption is not an immigration-related employment practice. The issues complainant raises have nothing whatever to do with immigration-related employment practices related to the hiring of individuals, and are simply beyond the reach of 8 U.S.C. § 1324b(a)(6).

Aguilar purports to believe that the INA applies not only to documents presented in support of an Employment Eligibility Verification Form (Form I-9), but to any documents whatever submitted by an employee for the alleged purpose of "secur[ing] all of his rights as a U.S. Citizen in relationship to his employer." One of those rights, according to Aguilar, is the right to be free of withholding for taxes.

This case is one of a rapidly growing number of OCAHO cases premised upon the same or substantially similar allegations seeking to transform OCAHO proceedings into a forum for the exposition of the political agenda of the National Worker's Rights Committee. Manning v. City of Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Public Service Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Hadley, 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. A.K. Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear

Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc.; 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. Nynex, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc.,[6] 6 OCAHO 892 (1996), appeal filed No. 96-3688 (3d Cir. 1996). Each of these cases asserted similar claims that a respondent employer's requirement for an employee's social security number and/or an employer's withholding of sums from an employee's wages for taxes, is an immigration-related unfair employment practice or otherwise discriminates in violation of 8 U.S.C. § 1324b. All of these cases were dismissed at an early stage; none has survived preliminary motions to dismiss either on jurisdictional grounds or for failure to state a claim.

Aguilar's assertion that citizens of the United States residing therein are not subject to federal taxation and are free to decline participation in the social security system have been rejected in a number of other federal fora. For over 75 years, the Supreme Court and lower federal courts have recognized the Sixteenth Amendment's authorization of non-apportioned direct income taxes upon United States citizens residing in the United States. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 12-19 (1916), Lovell v. United States, 755 F.2d 517, 519 (7th Cir. 1984), Parker v. Commissioner, 724 F.2d 469, 471 (5th Cir. 1984), United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981). Employers are required by 26 U.S.C. § 3102(a) and § 3402(a) to deduct and withhold income and social security taxes from the wages of their employees. It is also well established by the highest authority that one may not unilaterally opt out of the social security system. United States v. Lee, 455 U.S. 252, 258 (1982). The Ninth Circuit has long held that an employer is not liable to an employee for complying with a legal duty to withhold for taxes. Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 770 (9th Cir. 1986). These clear precedents are not vulnerable to overruling by an administrative tribunal with jurisdiction limited to specific provisions of the INA.

The complaint sets forth no factual assertions which could remotely give rise to an inference of retaliation. If Aguilar's driver's license was suspended, he may not lawfully work as a driver. No causal relation has been alleged or can reasonably be inferred between Aguilar's termination and the submission of his documents several months previously. While Aguilar is entitled to the benefit of every reasonable inference, no factfinder could draw such an inference from the facts alleged.

The complaint must be dismissed. Ordinarily the dismissal of a claim for failure to meet minimal pleading requirements should be accompanied by a grant of leave to file an amended complaint to cure the defect. However, where it appears to a certainty that amendment would be futile, there is no reason to permit such filing. Cf. Acito v. IMCERA Group, Inc., 47 F.3d 47, 55

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[6] While neither Kotmair or the National Worker's Rights Committee appear of record in Toussaint, the allegations are substantially similar.

(2d Cir. 1995). In light of the increasing weight of developing precedent in this forum summarily and unanimously rejecting similar frivolous claims, no amendment will be permitted.

FINDINGS

1. Richard Aguilar was hired by United Parcel Service in 1975 or 1976.

2. Richard Aguilar continued to work at United Parcel Service from 1975 or 1976 until February 12, 1997.

3. On June 24, 1996, Richard Aguilar presented to United Parcel Service documents entitled "A Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" and "Affidavit of Constructive Notice asserting my rights as a Citizen of the U.S. as seen by the U.S. Supreme Court, and there by (sic) revealing that I am not to be treated as an alien."

4. The precise origin of the documents is undisclosed.

5. The documents were presented to United Parcel Service for the purpose of persuading the employer to cease withholding sums from Aguilar's wages for federal taxes and social security contributions.

6. United Parcel Service declined to honor the documents or to cease withholding sums from Aguilar's wages for federal taxes and social security contributions as Aguilar requested.

7. The documents were not presented in the process of hiring, recruitment, or referral for a fee.

8. The documents were not presented for the purpose of showing Aguilar's identity or eligibility to work in the United States.

9. The documents are not documents acceptable for the purpose of showing an employee's identity or eligibility to work in the United States.

10. United Parcel Service had no obligation to ascertain Aguilar's eligibility to work in the United States or to complete a Form I-9 for him.

11. United Parcel Service's rejection of Aguilar's documents does not violate 8 U.S.C. § 1324b.

12. Richard Aguilar was terminated from his job as a driver with UPS on February 12, 1997.

13. Aguilar's termination was related to the suspension of his driver's license.

14. Aguilar's termination was not related to his submission of the subject documents.

CONCLUSIONS

1. The circumstances surrounding Aguilar's termination are not circumstances from which an inference of citizenship discrimination or of retaliation within the meaning of 8 U.S.C. § 1324b may be drawn by any reasonable factfinder.

2. Aguilar's complaint fails to state a claim upon which relief can be granted because it poses no issues cognizable under 8 U.S.C. § 1324b. It is accordingly dismissed.

SO ORDERED

Dated and entered this 2nd day of September, 1997.

_____
Ellen K. Thomas
Administrative Law Judge

APPEAL INFORMATION

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 1997, I have served copies of the foregoing Final Decision and Order of Dismissal on the following persons at the addresses indicated:

Poli Marmelejos, Esq.
Acting Special Counsel
Office of Special Counsel for Immigration-
Related Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Christopher J. Brelje, Esq.
Lewis and Roca LLP
40 North Central Avenue
Phoenix, AZ 85004

John B. Kotmair, Jr.
National Worker's Rights Committee
12 Carroll Street
Westminster, MD 21157-9999

Richard Aguilar
c/o 1812 Corte Del Sol
Alamogordo, NM 88310-9999

United Parcel Service
1331 South Vernon Street
Anaheim, CA 92805-9999

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041

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Cynthia A. Castañeda
Legal Technician to
Ellen K. Thomas
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
(703) 305-1742